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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 28 2005
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as a visiting research associate at the Indiana University School of Dentistry (IUSD). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits copies of previously submitted documents and a new statement. There is no evidence that counsel participated in the preparation or filing of the appeal. Absent affirmative evidence of withdrawal, however, counsel remains on record as the petitioner's attorney.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner readily qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would be of no further benefit to the petitioner, and therefore we need not discuss that issue here. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's work:

> [The petitioner] is a plant and mammalian geneticist of exceptional ability specializing in the discovery of new genes for improved understanding of the underlying mechanisms and causes of various plant and human diseases. . . . [The petitioner's] breakthrough discovery of a new cleft palate gene in mice is the first time in the world a scientist identified [a] previously unknown single gene responsible for cleft palate. . . .
>
> [The petitioner] is at the forefront of genetic studies leading to new diagnoses and affordable treatment strategies specific to prevention and elimination of craniofacial disorders. Her discoveries have provided effective information for identifying individuals who are at high risk. She is also the first scientist to discover effective selectable gene markers for a fungus which causes disastrous yield loss to citrus fruits. At USDA, [the petitioner] helped develop beneficial bacteria to control plant diseases caused by soil fungus.

The petitioner submits several witness letters in support of the petition. [redacted] research microbiologist at the Agricultural Research Service, supervised the petitioner's work for two years. [redacted] states:

> [The petitioner] worked in my laboratory as a microbiologist on a project directed at developing environmentally sound alternatives to the soil fumigant, methyl bromide. We are using non-pathogenic, plant-beneficial microorganisms to suppress plant pathogens for disease control.
>
> [The petitioner] played a highly important role on a variety of projects that are critical to my laboratories [sic] goal of developing beneficial bacteria to control soil fungi that cause plant diseases. [The petitioner's] substantial contributions to these projects allowed them to

> progress very rapidly. . . . [the petitioner] performed the experiments for antagonist screening in the lab and greenhouse, and helped discover promising biocontrol agents for suppression of wheat root rot and root rots of vegetables. She also participated in molecular studies concerning mechanisms by which antagonists suppress plant diseases.

Prof[redacted] director of Oral Facial Genetics at IUSD, states:

> Her efforts have culminated in the identification of a gene that causes a birth defect involving the mouth called non-syndromic cleft palate. Cleft palate is a relatively common birth defect affecting approximately 1 out of 2,500 American babies. Prior to her work, the genetic causes for the form of cleft palate [the petitioner] is studying were not known. In fact, many scientists in this country and around the world have been working for years on similar projects to find these genes. . . .
>
> [The petitioner] was the first one in the world to discover the connection of this gene and non-syndromic cleft palate, a significant breakthrough for science and for the America[n] people. [The petitioner] is continuing her work in discovering the expression of the gene in the mouse model system and how this gene works.

Professo[redacted] director of Ph.D. Dental Science and Student Research Programs at IUSD, states that the petitioner's finding regarding the cleft palate gene "was highly regarded by other scientists as a breakthrough in the field. . . . The successful identification of the susceptibility gene for cleft palate in mouse will stand out as a key piece to the puzzle of cleft disorders in human."

[redacted] senior staff scientist and director of the Neurophysiology Laboratory at St. Joseph Hospital and Medical Center, Phoenix, Arizona, states: "The discoveries by [the petitioner] of the cleft palate disorder gene and its expression in the model system are milestones in the field of cleft palate research. [The petitioner's] work has answered many critical questions that scientists have been asking for many years."

The director issued a request for evidence, instructing the petitioner to submit additional evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director asked whether any other researchers had cited the petitioner's published work regarding cleft palate, which witnesses had described as "breakthrough" and "milestones."

In response, the petitioner submits new evidence and explanatory notes from counsel. Counsel acknowledges that the petitioner's cleft palate work had not yet been published, but counsel maintains that "the scientists who previously provided the letters of reference serve as an indicator of the notoriety [the petitioner] has received as a result of this accomplishment."

The initial submission included five witness letters. One of the letters concerned the petitioner's work with plants. This leaves four letters about the petitioner's findings regarding cleft palate. Three of these four witnesses are on the faculty of IUSD. The remaining letter is from [redacted] a neurophysiologist whose "research concerns . . . brain function," which is an area of expertise quite separate from the study of the causes of cleft palate. [redacted] claims no particular expertise in the petitioner's subject area, nor does [redacted] identify any particular connection between his own work and that of the petitioner. [redacted] simply describes the petitioner's work, with no indication of how he learned about this work. The assertion that the petitioner's "research has . . . contributed greatly to the cleft palate research communities" does not compel the conclusion that [redacted] is a member of such a community.

Thus, the initial letters, cited by counsel as "an indicator of the notoriety [the petitioner] has received," do not show that any geneticists or cleft palate specialists outside of IUSD have taken particular notice of the petitioner's work. New evidence continues this trend. In-house publications and press releases from Indiana University mention the petitioner's work, but the record offers no indication that other institutions have taken similar notice. An April 2003 "calendar of events" at Indiana University focuses not on the work itself, but on the fact that [redacted] received two years of grant funding. A November 2003 "calendar of events" relates to [redacted] work with dental fluorosis, a topic never mentioned in the petitioner's initial filing. The November 2003 document never mentions the petitioner, and therefore cannot possibly be interpreted as a sign of the significance of the petitioner's work (as opposed to the general importance of the project as a whole).

A new letter is, likewise, from an IUSD faculty member. The aforementioned [redacted] an assistant professor at the university's Oral Facial Genetics Division, states that the petitioner was selected from "a number of highly qualified applicants" because, unlike other applicants, she possesses expertise in more fields than the other applicants. [redacted] repeats the assertion that the petitioner's discovery of a particular mouse gene is of "tremendous" significance, but he offers no evidence that any cleft palate researcher outside of IUSD shares this assessment or is even aware of the petitioner's work. [redacted] does not specify whether or not the university has any intention of retaining the petitioner's services after the conclusion of her temporary appointment as a visiting research associate or the end of the two-year grant period. The assertion that holding the petitioner to the labor certification requirement would delay or halt progress in cleft palate research, and eliminate U.S. jobs, is speculative and conjectural.

The director asked whether the petitioner's work has affected laboratories outside of Indiana University. In response, counsel identifies individuals outside of Indiana University who are collaborating with the petitioner. Such collaborations beg the question of the degree of influence that the petitioner has had on non-collaborators.

With regard to citation of the petitioner's past published work, the petitioner submits documentation showing that four articles cited one of the petitioner's plant biology articles from the journal *Crop Protection*. One of the four citing articles is "The effect of amplitude-dependent damping on wind-induced vibrations of a super tall building," which appeared in the *Journal of Wind Engineering and Industrial Aerodynamics*. The relation of molecular plant genetics to the wind dynamics of a skyscraper is not readily apparent, and it appears (absent a copy of the citing article itself) that this reference reflects an error in the citation database.

The petitioner has submitted information from the Chinese Science Citation Database. The information shows eleven citations of the petitioner's work, one of which is a self-citation. In all, five of the petitioner's articles have been cited. Three of those articles were cited only once, all in the same place [redacted] "The proceedings in biotechnology research on citrus in China," *Pomology Science*, v. 16, no. 2, p. 140). The most-frequently cited article has four independent citations (including the same *Pomology Science* article) and the petitioner's self-citation. This does not appear to be a remarkable citation rate, and it pertains to the petitioner's apparently abandoned work in agricultural science.

The director denied the petition, noting that the record contains minimal evidence of reaction to the petitioner's current work outside of IUSD, work which "even today . . . has yet to be formally disseminated beyond the petitioner's campus." The director concluded that, if the witnesses are correct with regard to the importance of the petitioner's work, then independent evidence to confirm this will soon be available in abundance and can then form the basis of a new petition.

On appeal, the petitioner states: "I have been an established scientist [who] specialized in plant science research. . . [redacted] an internationally prominent scientist in the field, cited my four papers as breakthrough researches in his review article 'The Proceedings in Biotechnology Research on Citrus in China.'" The record already documented these citations by [redacted] but the petitioner submits nothing new to show tha[redacted] cited the petitioner's work as "breakthrough research." The director, in denying the petition, speculated that [redacted] article may simply list articles that deal with the topic at hand; the petitioner, on appeal, submits nothing to contradict that assessment. Because the petitioner has not submitted the article itself, any comment about its content is unsubstantiated.

More to the point, there is no indication that the beneficiary has resumed, or intends to resume, her past research in plant science. Therefore, the beneficiary's prior work in that area (which constitutes most of her professional history) carries substantially diminished weight.

Regarding her current biomedical work the petitioner repeats prior claims regarding the significance of her discovery of the mouse gene, and broad range of qualifications for the position she now holds. There is still no independent corroboration from within the specialty of cleft palate research; the petitioner indicates that she is working on two manuscripts "that will soon be submitted for publication," which is essentially what was claimed several months earlier in response to the request for evidence. This is consistent with the director's finding that it is too early to judge the impact of the petitioner's work regarding the genetic basis of cleft palate. The same can be said of the petitioner's even more recent work involving dental fluorosis, which may not even have commenced until after the petition's filing date (judging from its absence from the original finding).

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.